

Notice of Allowability

Application No.

10/790,489

Examiner

Phyllis G. Spivack

Applicant(s)

FREEHAUF, KEITH ALLAN

Art Unit

1614

- The MAILING DATE of this communication appears on the cover sheet with the correspondence address--

All claims being allowable, PROSECUTION ON THE MERITS IS (OR REMAINS) CLOSED in this application. If not included herewith (or previously mailed), a Notice of Allowance (PTOL-85) or other appropriate communication will be mailed in due course. **THIS NOTICE OF ALLOWABILITY IS NOT A GRANT OF PATENT RIGHTS.** This application is subject to withdrawal from issue at the initiative of the Office or upon petition by the applicant. See 37 CFR 1.313 and MPEP 1308.

1. ☒ This communication is responsive to September 14, 2009.
2. ☒ The allowed claim(s) is/are 1,2,4-7,9-16 and 24.
3. ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some* c) ☐ None of the:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

* Certified copies not received: ____.

Applicant has THREE MONTHS FROM THE "MAILING DATE" of this communication to file a reply complying with the requirements noted below. Failure to timely comply will result in ABANDONMENT of this application.

THIS THREE-MONTH PERIOD IS NOT EXTENDABLE

4. ☐ A SUBSTITUTE OATH OR DECLARATION must be submitted. Note the attached EXAMINER'S AMENDMENT or NOTICE OF INFORMAL PATENT APPLICATION (PTO-152) which gives reason(s) why the oath or declaration is deficient.
5. ☐ CORRECTED DRAWINGS (as "replacement sheets") must be submitted.
- (a) ☐ including changes required by the Notice of Draftsperson's Patent Drawing Review (PTO-948) attached
- 1) ☐ hereto or 2) ☐ to Paper No./Mail Date ____.
- (b) ☐ including changes required by the attached Examiner's Amendment / Comment or in the Office action of Paper No./Mail Date ____.
- Identifying Indicia such as the application number (see 37 CFR 1.84(c)) should be written on the drawings in the front (not the back) of each sheet. Replacement sheet(s) should be labeled as such in the header according to 37 CFR 1.121(d).
6. ☐ DEPOSIT OF and/or INFORMATION about the deposit of BIOLOGICAL MATERIAL must be submitted. Note the attached Examiner's comment regarding REQUIREMENT FOR THE DEPOSIT OF BIOLOGICAL MATERIAL.

Attachment(s)

1. ☐ Notice of References Cited (PTO-892)
2. ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3. ☐ Information Disclosure Statements (PTO/SB/08),
Paper No./Mail Date ____
4. ☐ Examiner's Comment Regarding Requirement for Deposit of Biological Material
5. ☐ Notice of Informal Patent Application
6. ☒ Interview Summary (PTO-413),
Paper No./Mail Date 10/7/09.
7. ☒ Examiner's Amendment/Comment
8. ☒ Examiner's Statement of Reasons for Allowance
9. ☐ Other ____.

/Phyllis G. Spivack/
Primary Examiner, Art Unit 1614

EXAMINER'S AMENDMENT

An Examiner's Amendment to the record appears below. Should the changes and/or additions be unacceptable to Applicant, an amendment may be filed as provided by 37 CFR 1.312. To ensure consideration of such an amendment, it **MUST** be submitted no later than the payment of the issue fee.

Authorization for this Examiner's Amendment was given in a telephone interview with John Esteban Ezcurra on October 7, 2009.

Claims 17-23 are canceled.

In the **Title**: "and Method of Making the Same" is deleted.

In the **Abstract**: On both lines 3-4 and 6, the recitation "or prophylaxis" is deleted.

The following is an Examiner's statement of **Reasons for Allowance**:

Applicant's Amendment filed September 14, 2009 is acknowledged. Claims 1, 2, 4-7, 9-16 and 24 are under consideration.

Claim 24 remained rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement in the last Office Action. It was asserted the claim contains subject matter that was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor, at the time the application was filed, had possession of the claimed invention. Support for the

range of antioxidant of the premix of claim 24, i.e., "about 0.5% (w/w)," was not found in the provisional application.

Applicant argues, according to *In re Wertheim*, 191 USPQ 90 (CCPA 1976), the recited range of "about 0.1% to about 2% in provisional application S.N. 60/530,939 is narrow and supports a recitation of about 0.5% (w/w) for the antioxidant in claim 24, part b.

Upon reconsideration, Applicant's argument is persuasive. The rejection of record under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement, is withdrawn.

In the last Office Action claims 1, 2 and 4-23 remained rejected under 35 U.S.C. 103(a) as being unpatentable over Jancys, A.H., U.S. Patent 6,489,303, in view of Katoh et al., U.S. Patent 4,939,166, Chabala et al., U.S. Patent 4,199,569, Sutherland et al., U.S. Patent 4,910,219, Freehauf et al., U.S. Patent 7,001,889, and Carson et al., U.S. Patent 6,548,478.

Applicant argues the subject matter of Freehauf, U.S. Patent 7,001,889, and the claimed invention were owned by the same person or subject to an obligation of assignment to the same person, and, according to MPEP § 706.02(k), the reference is disqualified as prior art. The instant inventor, Mr. Freehauf, was obligated to assign his inventions to Merial at the time of the instant invention.

Further, in view of the unexpected results that are demonstrated in the Tables on pages 17-21 of the specification, wherein the additional stabilizer added to the IVOMECE

premix provides a benefit with respect to minimization of degradation and extension of shelf life relative to the original premix, the rejection of record under 35 U.S.C. 103(a) is withdrawn.

Claims 17-23 are canceled as indicated *supra*.

Claims 1, 2, 4-7, 9-16 and 24 are allowed in view of the contemporary knowledge of the art.

Any comments considered necessary by Applicant must be submitted no later than the payment of the issue fee and, to avoid processing delays, should preferably accompany the issue fee. Such submissions should be clearly labeled "Comments on Statement of Reasons for Allowance."

Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Phyllis G. Spivack whose telephone number is 571-272-0585. The Examiner can normally be reached on 10:30 AM-7 PM.

If attempts to reach the Examiner by telephone are unsuccessful after one business day, the Examiner's supervisor, Ardin Marschel, can be reached on 591-272-0718. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

October 8, 2009

/Phyllis G. Spivack/
Primary Examiner, Art Unit 1614